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Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

DAVID L. LANG
Petitioner,

v.

JOHN W. SNOW, ET AL.,
Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

David L. Lang, *Pro Se*
6204 Riviera Drive
North Richland Hills, TX 76180
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Date: May 16, 2008

QUESTIONS PRESENTED

1. Whether a government agency failure to conduct an investigation into claims of discrimination as required by *Section 717 of the Civil Rights Act of 1964, 42 U.S.C § 2000e, Executive Order No. 11478, and 29 C.F.R. § 1614.108(d)* denied petitioner *due process*?

2. Whether the introduction of a prior EEO complaint as evidence to support disciplinary action, and testimony at an administrative hearing regarding EEO activity, to support a disciplinary action are reasonably likely to deter employees from engaging in protected activity as decided by the *Supreme Court in Burlington Northern Santa Fe Railway Co., v. Sheila White* (05-259)?

3. Whether in affirming the District Court grant of summary judgment, the Appeals Court violated *FRCP Rule 56* by failing to take genuine disputed fact into consideration and conflicted with that court's ruling in *Fabela v. Socorro Independent School District, No. 02-50138 (5th Cir., April 24, 2003).*?

4. Whether a policy or regulation established by a federal agency regarding delegation of specific authority to take or approve certain actions, binds the agency to comply with the adopted policy?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties. Pursuant to *Rule 29.6* a corporate disclosure statement is not required.

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29 C.F.R. § 1614.....
EEOC Management Directive 110.....

Cited statutes are excerpted in the Appendix to this petition. (App. 55)

OPINIONS BELOW

The Court of Appeals for the Fifth Circuit decision denying Petition for Rehearing was issued on February 19, 2008, and is reproduced in the Appendix (App. A, p. 1). The opinion of the Court of Appeal for the Fifth Circuit affirming summary judgment was issued on December 21, 2007, and is reproduced in the Appendix (App. B, pp. 2-4). The order of the District Court for the Northern District of Texas granting summary judgment is reproduced in the Appendix (App. C, pp. 5-8). The Equal Employment Opportunity Commission's decision on review of MSPB Final Order was issued on January 20, 2006 and is reproduced in the Appendix (App. D, pp. 9-12). The MSPB Final Order denying petition for review was issued on

September 23, 2005, and is reproduced in the Appendix (App. E, pp. 12-13).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on December 21, 2007. On February 1, 2008, Petitioner timely filed a request for panel rehearing. The petition for panel rehearing was denied by order dated February 19, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions involved in this petition are set forth in Appendix G.

STATEMENT OF THE CASE

Petitioner is an African-American male who has been employed by the Bureau of Engraving Printing (BEP) at its Fort Worth, Texas facility since June 1998. Prior to beginning his employment with the BEP, petitioner worked six years as a civil servant, GS-12 with the U.S. Army, and served 21 years on active military duty with the U.S. Army. Petitioner accepted a GS-11, Security Specialist position when he began his employment with the BEP. Between June and August 1998, the BEP promoted petitioner from GS-11 to a GS-13, Security Branch Manager Position. In December 1999 petitioner applied for and was non-selected for a position as GS-14, Security Division Manager. Believing the non-selection was based on discrimination, petitioner filed an EEO complaint. The EEO complaint was concluded in January 2001, by settlement agreement providing for a temporary promotion to GS-14, Deputy Security Manager, with equipments to meet certain conditions before the promotion was permanent.

A condition established by the settlement agreement was a requirement to attend a Basic Criminal Investigator's Course at the Federal Law Enforcement Training Center (FLETC), Glynco, GA., or request and obtain a waiver from attending. A national demand for law enforcement and security training following events of 9/11 made it impossible for the Agency to obtain FLETC training allocations in time to meet the training condition. Petitioner applied for and was denied a waiver from attending the FLETC course. In February 2002, the promotion to GS-14 was made permanent before conditions in the

settlement agreement were reached. The Agency indicated attending the FLETC course was still a condition of the settlement, not yet achieved. In June 2002, petitioner filed another EEO complaint regarding the FLETC training. The complaint was settled at the informal stage with the requested waiver provided.

In November 2002, petitioner's supervisor provided his written annual rating of performance. The performance evaluation indicated a reduction in a critical element regarding security, safety and support of EEO. When questioned about the rating, the supervisor claimed the reduced rating was because of inappropriate jokes told during the rating period. Having not been put on notice for any inappropriate behavior prior to receiving his annual rating, on February 18, 2003, petitioner contacted the Agency's EEO office and requested counseling.

On October 21, 2003, petitioner's supervisor proposed a two-grade demotion, alleging misconduct from an incident occurring on August 20, 2003. The proposal listed several documents as supporting evidence for the demotion. The proposal was decided on January 23, 2004. The deciding official demoted petitioner one grade, to a GS-13, non-supervisory investigator. The decision letter provided petitioner two procedures in which he could appeal the demotion, MSPB or EEOC. Petitioner elected the EEO process, as he asserted discrimination was involved in the demotion. The Agency accepted petitioner's formal EEO complaint as a mixed-case. On June 30, 2004, after more than 120 days had elapsed without a decision from the Agency, petitioner appealed to the MSPB. On September 20, 2004, an MSPB hearing

was held. On January 26, 2005, the MSPB Administrative Judge issued an initial decision affirming the Agency's action. App. 23a-30a.

Petitioner requested a review of the *Id* from the full Board, which was denied on September 23, 2005. App. 21a-22a. On October 23, 2005, petitioner requested a review of the MSPB decision from the Commission. On January 20, 2006, the Commission issued a decision concurring with the Board's final decision. App. pp. 17a-20a. After exhausting all administrative remedies, On February 14, 2006, petitioner filed a civil suit in the U.S. District Court. On February 2, 2007, the District Court issued a summary judgment dismissing all claims. App. 4a-16a. Petitioner appealed the District Courts decision to the Court of Appeals for the Fifth Circuit. On December 21, 2007, the Appeals Court issued a decision affirming the District Court summary judgment. App. 2a-3a. Petitioner filed a Petition for Panel Rehearing. On February 2, 2008, the Appeals Court denied the petition for rehearing. App. 1. It is from that final action this petition is filed.

REASON FOR GRANTING THE WRIT

1. With the enactment of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et. Seq., the Equal Employment Opportunity Commission (Commission) was established to prevent any person from engaging in any unlawful employment practice. App. 53a. On August 8, 1969 the President signed into law Executive Order 11478. With the signing of EO 11478, employees of the Federal Government were provided many of the protections afforded to their

public counterparts. Section 4 of EO 11478 empowered the Commission to issue rules, regulations, orders and instructions necessary to carry out the Order. App. 53a. Section 5 of EO 11478 requires the head of each department or agency to comply with the rules, regulations, orders and instructions issued by the Commission. App. 53a.

The Commission issued 29 C.F.R. § 1614 and Management Directive 110 to govern EEO complaint processing within the Federal sector. 29 C.F.R. § 1614.106(e) (2) established a requirement for Agencies to conduct an impartial and appropriate investigation within 180 days. App. 55a. 29 C.F.R. § 1614.302(d) (1) reduces the time for Agencies to complete investigations on mixed-case complaints from 180 to 120 days. App. 55a-56a. Pursuant to 5 C.F.R. § 1201.154(b)(2) and 29 C.F.R. 1614 § 302 a mixed-case is a matter alleging discrimination which may be appealed to the Merit Systems Protection Board (Board/MSPB). App. 56a. 29 C.F.R. § 1614.108(a) firmly established and reemphasize the requirement for Agencies to conduct investigations. Section 108(b) requires investigations conducted by Agencies to be impartial, appropriate and factual. App. 55a.

The decision letter, demoting petitioner was issued on January 23, 2004, and required him to select between appealing directly to the MSPB or EEOC as established by 5 U.S.C. § 7702(a). App. 57a-58a. The letter emphasized that the process selected first would govern the processing of his appeal. Petitioner believed the action against him involved discrimination and elected to file a formal EEO complaint. The agency accepted the formal complaint as a mixed-case. In accordance with 29 C.F.R. §

1614.302(d) the Agency was required to complete the investigation within 120 days. App. 58a. The 120 days elapsed without the Agency requesting an agreement for extension as required by 29 C.F.R. § 1614.106(e)(2) or advising petitioner that a final decision would be issued within 45 days without a hearing, as required by 29 C.F.R. § 1614.302(d)(2). App. 58a.

Laws allowing Federal Agencies to conduct their own investigations into complaints against them have great potential for disadvantaging federal workers. As demonstrated above; laws, rules and regulations are in place to minimize these disadvantages when compliance is enforced. During the MSPB hearing it was abundantly clear the Agency had failed to conduct the required investigation. The Id issued by the presiding AJ noted this fact in front of his decision. App. 23a. Instead of remanding the case to the Agency with instructions to complete an investigation or providing a cure by expanding discovery to allow petitioner an opportunity to develop evidence to support his claims of discrimination, the record was closed with only the evidence favorable to the Agency being presented. This denial of due process prejudiced petitioner's pursuit for justice through all administrative and judicial appeals to this point.

5 C.F.R. § 1201.1153 provides the Commission an opportunity for independent determination on misguided MSPB decisions involving discrimination. Section 1153(a)(2) requires appellants to describe Agencies actions regarding complaints and grievances. App. 57a. 5 U.S.C.§ 7702 (b)(3)and (4) provides the Commission authority, on review to supplement the records to the extent it considers necessary. App. 57a. On petition for EEOC to review the MSPB decision,

petitioner prominently pointed to the Agency's failure to conduct an EEO investigation. The Commission routinely refers cases for completion of investigations or sanctions Agencies for failure to conduct the investigation required by 29 C.F.R. 1614.108.

The Commission consistently holds Agencies responsible for complying with the requirements of 29 C.F.R. § 1614. In Jansson v. Department of Justice, EEOC Appeal No. 01A22553 (August 23, 2002).The Commission vacated the agency's finding of no discrimination, and ordered the agency to process complainant's claims in the manner mandated by the Commission's regulations. The Commission found the agency deficient in such requirements as failing to inform complainant how to contact an EEO Counselor; failing to timely assign a Counselor; failing to accept issues for investigation until nearly a year after complainant had filed her complainant; and failing to properly investigate her claims. No such action was taken in petitioner's case.

2. On October 21, 2003, petitioner was presented a proposal for disciplinary action. The proposal letter identified and attached a copy of an informal EEO complaint filed by petitioner on February 18, 2003. Dave Graf the acting HR manager and Labor Relations supervisor investigated the alleged misconduct and included a copy of petitioner's EEO complaint as documents to support the two-grade demotion he recommended to the proposing supervisor. [1] App. 43a.

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[1] Id, App. 45a. Accordingly, Graf said that he attached to the proposal package evidence to demonstrate this, including a copy of the letter of warning and the EEO counselor's report indicating

Information related to the EEO informal process is strictly confidential. As the acting HR manager Graf's access to petitioner's EEO complaint information was forbidden by regulation. The Commission's Management Directive MD 110 requires separation between EEO operations and positions that advise managers on personnel decisions. This separation is directed, because the Commission understands the high potential for challenging and competing motivation between positions with conflicting responsibilities. App. 56a. The Agency had no evidence to support its assertion petitioner had previously been counseled for similar misconduct as required by Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981). The EEO complaint Graf unlawfully obtained provided no such evidence as the report was not written by petitioner and made no admission counseling for prior misconduct occurred.

Effective February 8, 2004, Petitioner was demoted from a GS-14 management position to GS-13, non-supervisory investigator duties within the same office he once managed. The deciding official, Voelker, testified at the MSPB hearing that Graf pointed out the EEO complaint because it included a reference to Howe having counseled the appellant about telling "dirty jokes." App. Id, 42a, 49a.. Voelker further testified he relied on information in the proposal package and discussions with Graf to decide the penalty. App. Id, 51a.

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that the appellant admitted Howe had counseled him about telling "dirty jokes."

The Supreme Court in Burlington Northern Santa Fe Railway Co., v. Sheila White (05-259) decided that:

> "We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's action must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

In Fabela v. Socorro Independent School District, No. 02-50138 (5th Cir., April 24, 2003) the Court of Appeals for the Fifth Circuit ruled that references made regarding prior EEO activity in connection with a dismissal action provided direct evidence of a retaliatory motive. The Court opined:

> We emphasize also that to successfully establish the element of causation in the direct evidence rubric, Fabela's evidence does not have to support the conclusion that retaliation was the only motive or even that it was the determining motive. Only that it was among the motivating factors which led to the adverse action.

The record is clear, obtaining; introducing and considering petitioner's prior EEO activity played a substantial role in the decision on adverse action against him. Petitioner was stripped of his

management authority and forced to serve as a subordinate to employees he once supervised. Using EEO complaints to support discipline has and will most diffidently deter other employees from making claims of discrimination. Petitioner's demotion serves as a constant reminder of consequences and uncontrolled authority Agencies have over employees who oppose discrimination in the workplace.

3. As required by FRCP Rule 56, in opposition to the Agency's motion for summary judgment in District Court, petitioner presented relevant evidence of specific facts that created genuine issues for trial. Issues presented included: (1) a dispute regarding the deciding official's authority to decide the adverse action; (2) dispute regarding the inappropriateness of including an EEO complaint to support adverse action; (3) a declaration providing firsthand knowledge of violations committed by similarly situated employees outside petitioner's protected group who were not disciplined; and (4) affidavits from witnesses with firsthand knowledge, attesting that acts of alleged misconduct the Agency referenced at trial and use to decide the adverse action had not occurred. All evidence provided in opposition to summary judgment was discarded by the Order issued by the District Court. App. 4a.

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) this Court ruled that:

> Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the

> summary judgment stage, the trial judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict.

The genuine dispute regarding authority of the deciding official and inappropriateness of introducing an EEO complaint, standing alone were grounds to deny summary judgment. This is especially true when considering in Fabela v. Socorro Independent School District, No. 02-50138 (5th Cir., April 24, 2003) the Court of Appeals for the Fifth Circuit ruled that references made regarding prior EEO activity in connection with a dismissal action provided direct evidence of a retaliatory motive. The District Court's Opinion conflicted with Fabela. The Court of Appeals is in conflict with its own decision in Fabela.

4. The Agency appointed Ronald Voelker, GS-14, WCF, Currency Manufacturing Division manager to serve as final decision maker in the action to reduce the grade of petitioner. Voelker issued his decision to demote petitioner on January 23, 2004. At the time

the proposal for adverse action was made and decided, the proposing official, Howe, deciding official Voelker and petitioner held the same GS-14 grade. Adverse actions against federal employees are governed by 5 C.F.R. § 752. Pursuant to 5 C.F.R. § 752.404(c)(2) agencies shall designate an official to hear the employee's response who has the authority either to make or recommend a final decision on the proposed adverse action.

An MSPB hearing was held on September 20, 2004. During the hearing petitioner asserted it was harmful error for Voelker to serve as deciding official. The Agency presented testimony supporting their position that Voelker held the appropriate grade and administrative level to serve as deciding official in the adverse action. Throughout the hearing the Agency argued that Voelker was an administrative level above Howe and was therefore appropriate to serve as deciding official. App. 47a. Voelker gave extensive testimony regarding his elevated authority, compared to Howe and other same-grade managers. Voelker, and Howe both testified they lacked independent experience necessary to propose or decide the the adverse action and depended on Graf. App. 46a-49a. Graf conducted the investigation, wrote the proposal and decision and advised both proposing and deciding officials. The unchallenged involvement of Graf and the fact the deciding official did not conduct independent fact finding again denied petitioner due process. App. 41a, 44a, 45a, 48a 51a. In the Id, the AJ opined the Agency had not committed harmful error by selecting Voelker to serve as deciding official, because the agency presented credible evidence to support its assertions. App. 46a.

After the MSPB hearing record closed, petitioner discovered the Agency had two policies adopted that specifically governed levels of authority and delegation of authority. BEP Circular No. 10-01, unambiguously limits the authority to approve personnel or position actions involving employees holding the GS-14 grade to an Associate Director. App. 59a. BEP Circular 10-02.3A, established requirements for delegations of "right to act" authority to be accomplished by completing a specified BEP form. App. 59a-60a.

These documents were not available during hearing and there existence was not known. They were not discovered during a preceding EEO investigation because none was conducted, and they were not provided during discovery when the Agency was asked to produce all evidence relied upon to make its decisions regarding the adverse action. As required by 5 C.F.R. §1201.115(d)(1) the new material evidence was highlighted on petition for Board review. App. 58a. The Board denied the petition. App. 21a. In spite of the new and material evidence the EEOC refused to disturb the Board's decision. App. 17a. In response to the Agency's motion for summary judgment in District Court, petitioner provided BEP Circular No. 10-01 and BEP Circular 10-02.3A, along with his affidavit showing a genuine disputed issue for trial.

Agencies must follow the regulations they adopt. When violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. See, Phelps Dodge Corps. v. Federal Mine Safety and Health Review Comm'n, 681 F.2d 1189, 1193 (9th Cir. 1982) There is a proposition

that the deference is ordinarily owed to an agency's interpretation of its own regulation. See Providence Hosp. of Toppenish v. Shalala, 52 F.3d 213, 216 (9th Cir. 1995) However, no difference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position. See Idaho Dep't of Health & Welfare v. United States Dep't of Energy, 959 F.2d 149, 153 (9th Cir. 1992)

During the relevant period the demotion was proposed and decided neither Voelker nor Williams who appointed him acting in her absence held an administrative level or grade required by agency regulation to decide or approve a personnel action against petitioner. App. 59a-60a. As such, in accordance with 5 C.F.R. § 752.404(c)(2), neither had authority to decide or approve the adverse action.

The Agency's intent for establishing this policy was to prevent employees who hold the same grade from taking or deciding actions against each other that could create actual or the appearance of a conflict of interest or conflict in position. Allowing coworkers of the same grade to reduce the grade of their counterpart creates opportunities to eliminate competition for advancement.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that this Court grant the petition for writ of certiorari in order to consider the decision of the U. S. Court of Appeals for the Fifth Circuit, and administrative bodies involved.

Respectfully submitted;

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May 16, 2006,

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-10401

[February 19, 2008]

DAVID L. LANG

Plaintiff – Appellant

V.

JOHN W. SNOW, SECRETARY, UNITED STATES TREASURY

Defendant – Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING

Before WIENER, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-10401
Summary Calendar

[December 21, 2007]

DAVIT L. LANG

Plaintiff-Appellant

v.

JOHN W. SNOW, SECRETARY
UNITED STATES TREASURY Defendant-Appelle

Appeal from the United States District Court
For the Northern District of Texas
(4:06-CV-120)

Before WIENER, GARZA AND BENAVIDES, Circuit Judges.

PER CURIAM:

Proceeding *pro se* on appeal, Plaintiff-Appellant David L. Lang asks us to reverse the district court's summary-judgment dismissal of Lang's employment discrimination and retaliation action against his employer. Lang has asserted that the adverse employment action taken against him was grounded in racial discrimination and retaliation for his prior

complaints, contending that the reasons proffered by his employer --- including but not limited to an incident involving his telling an inappropriate "joke" with sexual innuendo from the podium in a public meeting --- was pretext. In response to the employer's motion for summary judgment, the district court explicated, at length and in considerable detail, the law relative to Lang's complaints and its application to the largely-uncontested material facts, concluding that Lang had failed to establish a prima facie case of the discrimination he alleged and, alternatively, that even if he had made out such a prima facie case, he had failed to establish that the legitimate, non-discriminatory reasons advanced by his employer for the actions taken were pretextual.

We have reviewed the record on appeal and the law applicable thereto as set forth in the appellate briefs of the parties and the rulings of the district court. As a result of our review, we are convinced that the district court properly granted the government's motion for summary judgment, dismissing Lang's action with prejudice. Consequently, for the reasons set forth by the district court in its Memorandum Opinion and Order signed February 1, 2007, the summary judgment of that court is, in all respects, AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

[February 1, 2007]

DAVID L. LANG,	§	
Plaintiff,	§	
	§	
VS.	§	NO. 4:06-CV-120-A
	§	
JOHN SNOW, Secretary	§	
United States Treasury,	§	
Defendant.	§	

MEMORANDUM OPINION
And
ORDER

On December 7, 2006, defendant, John Snow, Secretary, United States Treasury, Bureau of Engraving & Printing ("BEP"), moved for summary judgment on all claims asserted by plaintiff, David L. Lang ("Lang"), in this suit. Having considered the motion, the response, the reply, the summary-judgment evidence, and the applicable legal authorities, the court concludes that the motion should be granted as stated below.

I.
Plaintiff's Claims

In this lawsuit, Lang contends that BEP, his employer, discriminated against him based on race,

and retaliated against him based on prior EEO activity, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000-e-16, et seq., as amended by the Civil Rights Act of 1991, 42 U.S. C. § 1981a.

II.

The Motion for Summary Judgment

BEP maintains that Lang cannot establish a prima facie case of discrimination or retaliation. Even if there were evidence establishing a prima facie case as to either claim, BEP contends that it had a legitimate, non-discriminatory reason for demoting Lang. Further, BEP contends that Lang cannot establish that such non-discriminatory reason is pretextual.

III.

Facts

A. Relevant Undisputed Facts

1. BEP and Lang's Equal Employment Office Activity.

BEP is a bureau under the United States Department of Treasury and is responsible for manufacturing the nation's paper currency. Lang, an African American, has been employed at BEP's Western Currency Facility, located in Fort Worth, Texas, since June of 1998. Lang began his employment with BEP as a GS-11 grade security specialist in the product security branch. He was promoted to GS-12 grade approximately three months after he was hired and approximately two months

after that applied for and was promoted to a GS-13 position as a Product Security Branch Manager.

In October of 1999 a GS-14 grade Security Division Manager position became available and Lang applied. Ms. Martha Howe ("Howe") was selected to fill the position. Following the non-selection, Lang filed a complaint with the Equal Employment Office ("EEO"), which was resolved through a settlement agreement. The settlement agreement stated that after one year, if Lang had met the conditions of the agreement, he would be promoted to the Deputy Division Security Manger ("DDSM") position. Lang was promoted to the DDSM position in February of 2001 and was placed under the direct supervision of Howe. In 2002, Howe refused to grant Lang's request for a waiver from a Criminal Investigator course. Lang filed an informal complaint with the EEO and was eventually given the waiver he sought from Howe. In February of 2003 Lang again filed an informal complaint with the EEO concerning a performance evaluation Howe had given him on his annual appraisal. A formal complaint regarding such appraisal was never filed by Lang.

2. Lang's Story at the TCEPC Meeting

The Tarrant County Emergency Planning Committee ("TCEPC") held a meeting at BEP's Fort Worth facility on August 20, 2003. The meeting, being hosted by Isaiah Liggins ("Liggins"), was attended by representatives of Tarrant County agencies, communities, corporations, and organizations. Before the meeting began, Liggins found Lang speaking to the guests in the auditorium where the event was being held. After determining that Lang was speaking with them about the security of BEP's facility, he let the conversation continue, and told Lang that he

would return to start the meeting when all of the guests were present.

Lang was speaking from the podium in the auditorium when he told the following story:

> A drunk man stumbled into Military Police headquarters, where Lang stationed. The drunk man told Lang "Someone stole my car." Lang asked him "Where did you last see it?" The drunk [sic] man removed from his pocket a ring of keys, held out his car key, pointed to it and said "Right here." Lang then told the man "I will help you find your car, but I will also have to give you a citation for indecent exposure because your clothes are disarranged, your pants are open and you are partially exposed." The drunk man looked down and stated "Oh no, they stole my girlfriend too."

App. to Def.'s Br. In Supp. of Mot. for Summ. J. 259-60. Howe walked into the auditorium while Lang was telling the story and left at some point after Lang was finished. As Howe was leaving the room, Lang told the guests that Howe was his boss and that he might start passing out resumes because he may need to look for another job.

When Liggins returned to start the meeting, he thanked Lang for speaking to the quests while he was away. After others standing in the group began to laugh, Liggins wanted to know what had happened. Lang relayed to Liggins wanted to know what had happened. Lang relayed to Liggins the story he had told the quests and that Howe had heard him telling the story. Liggins later told BEP management officials that he did not think Lang's joke was appropriate for the guests.

3. Actions Taken Against Lang Following the TCEPC Meeting

Immediately after leaving the auditorium, Howe sought legal advice from Mary Larson ("Larson"), an attorney with BEP's legal office. Larson informed Howe that she needed to speak with someone in BEP's Labor Relations department regarding the incident.

Howe then consulted with Dave Graf ("Graf"), a BEP Labor Relations Manager, on what she should do in response to Lang's conduct. Howe wrote up a statement of what had happened, and Graf researched past cases to see if a similar incident had occurred and what BEP's response had been. Howe and Graf had several conversations regarding the incident and Lang's conduct. Following his research and gathering of evidence, Graf opined that demoting Lang to the highest non-supervisory grade position available would be appropriate. Taking Graf's advice, Howe proposed Lang be demoted two grades to a GS-12 investigator, the highest non-supervisory position available in BEP's Fort Worth security division.

BEP's Chief of Currency Manufacturing and Deputy Plant Manager, Ronald Voelker ("Voelker"), was the official responsible for making the final decision regarding Howe's proposed demotion of Lang. Lang submitted a request for an extension of the deadline to submit a response to the proposal, which Voelker granted. On November 2, 2003, Lang submitted his written response to the proposed demotion. After reviewing Lang's response, Voelker concluded that Lang could not be rehabilitated in his position as a DDSM and that demoting him was the appropriate penalty for Lang's behavior. However, after consulting with Graf to find a GS-13 position that would allow Lang to continue with the work he did in

security while limiting his exposure and dealings with the public,[2] Voelker decided that a one-grade demotion to that position was proper. On January 23, 2004, Voelker issued a memorandum informing Lang that he was being demoted to GS-13 non-supervisory position [3] and detailing Lang's rights to appeal the demotion. At the time of Lang's demotion, Voelker knew of Lang's prior EEO activity as well as Lang's race.

4. Lang's Appeal of His Demotion

Lang filed an appeal of his demotion with the Merit Systems Protection Board ("MSPB") on July 2, 2004. Lang contended that the demotion was not a proper punishment for the storytelling incident, and that such demotion constituted racial discrimination as well as retaliation for prior EEO activity. William Carnes ("Carnes"), an administrative judge for the MSPB, held a hearing regarding Lang's demotion on September 20, 2004. On January 26, 2005, Carnes issued a written decision concluding that the demotion of Lang did not constitute racial discrimination or reprisal for EEO activity and that such demotion should be upheld. Lang filed for and was denied a petition for review of Carnes' decision before the full board of the MSPB. Lang then filed an appeal with the Equal Employment Opportunity Commission ("EEOC") Office of Federal Operations ("OFO") and on January 20, 2006, it issued a decision approving of

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[2] At Voelker's instruction, Howe and Graf identified the investigative and security duties that Lang could continue to perform as an non-supervisory investigator and then created a description for such a position at a GS-13 level.

[3] Lang was demoted from a GS-14, step one position with, an annual salary of $88,349.00 to a GS-13, step eight position, with an annual salary of $88,442.00.

Carnes' decision to uphold Lang's demotion. On February 14, 2006, Lang filed the instant action in this court.

B. Relevant Disputed Facts

Howe maintains that during Lang's employment with BEP as a DDSM, she received multiple complaints about Lang telling inappropriate stories and jokes containing sexual innuendos. According to Howe, as Lang's supervisor she advised him that his behavior of telling such inappropriate jokes and stories was not acceptable, and that Lang told her he did not think he had acted inappropriately. Howe concluded that Lang's behavior warranted a lower performance evaluation and because of such behavior changed his annual appraisal from "exceeded" to "achieved" standards. Howe contends that she informed Lang that she did not approve of his conduct and that she would not allow such unprofessional behavior to continue. Lang disputes that he was ever counseled by Howe about telling inappropriate jokes or stories.

IV.

Applicable Summary Judgment Principles

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact. Anderson, 477 U.S. at 256. The movant may discharge this burden by pointing out the absence of evidence to support one or more essential elements of the non-moving party's claim "since a complete

failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986). Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. Anderson, 477 U.S. at 248, 256. To meet this burden, the nonmovant must "identify specific evidence in the record and articulate the 'precise manner' in which that evidence support [s] [its] claim [s]." Forsyth v. Barr, 19 F.3d 1527, 1537 (5th Cir. 1994). An issue is material only if its resolution could affect the outcome of the action. Anderson, 477 U.S. at 248. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. Simmons v. Lyons, 746 F. 2d 265, 269 (5th Cir. 1984).

The standard for granting a motion for summary judgment is the same as the standard for rendering judgment as a matter of law. Celotex Corp., 577 U.S. at 323. If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushita, 475 U.S. at 597. See also Boeing Co. v. Shipman, 411 F. 2d 365, 374-75 (5th Cir. 1969) (en banc)
(explaining the standard to be applied in determining whether the court should enter judgment on motions for directed verdict or for judgment notwithstanding the verdict).

V.
Analysis

A. McDonnell Douglas Burden-Shifting Test

In analyzing a claim of discrimination or retaliation based on circumstantial evidence, the court applies the three-step analytical framework from McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973) as modified by Desert Palace, Inc. v. Costa, 530 U.S. 90 (2003), See also Mayberry v. Vought Aircraft Co., 55 F. 3d 1086, 1089 (5th Cir. 1995). In a Title VII action, the complainant must first carry the initial burden under the statue of establishing a prima face case of discrimination or retaliation. McDonnell at 802. If he does, "the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for" the employer's adverse action. Id.. Finally, complainant must "be afforded a fair opportunity to show the [defendant's] stated reason for [the adverse action] was in fact pretext." Id. at 804.

B. Lang Has Failed to Establish a Prima Facie Case of Discrimination or Retaliation

1. Lang's Discrimination Claim

"In work-rule violation cases, a Title VII plaintiff may establish a prima facie case by showing" that employees outside of his protected class who engaged in similar conduct did not receive similar punishment. Mayberry, at 1090. Further, plaintiff has the burden of establishing that those that he alleges were similarly situated "were treated differently under circumstances nearly identical to his." Id. At 1090 (internal quotation marks omitted).

Lang has failed to meet his burden in adducing evidence of a prima facie case of racial discrimination because he cannot show that similarly situated

individuals outside his protected class were treated differently. Lang attempts to prove his prima facie case by showing that he received harsher treatment than some individuals whose conduct was "more serious" than that engaged in by himself. However, such characterizations of these individuals' behavior and the treatment they received are Lang's conclusions, and thus not proper summary judgment evidence. Further, in order to prove a prima facie case of disparate treatment, Lang must show that the persons that he claims were given different treatment were also similarly situated. Similarly situated, for the purpose of proving a disparate treatment case, is defined as persons disciplined by the same supervisor under "nearly identical" circumstances. See Mayberry, at 1090. The summary judgment record does not contain evidence that either Lang's supervisor, Howe, or the official responsible for demoting Lang, Voelker, ever disciplined another employee under nearly identical circumstances as those surrounding Lang's demotion. Therefore, Lang has failed to prove a prima facie case of discrimination.

2. Lang's Retaliation Claim

To establish a prima facie case of retaliation under Title VII, a "plaintiff must prove that: (1) he engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) there was a causal connection between the protected activity and the adverse employment action." Aldrup v. Caldera, 274 F. 3d 282, 286 (5th Cir. 2001) (citing Long v. Eastfield Coll., 88 F. 3d 300, 304 (5th Cir. 1996)).

Lang asserts in support of his retaliation claim that he was engaged in EEO activity, that he was demoted, and that his EEO activity was a reason for his

demotion. While Lang has met his burden in proving the first two elements, he has failed to meet the requirement of adducing evidence of a causal connection between hid demotion and his filing of EEO claims. See Aldrup, 274 F. 3d at 286. Lang's EEO activity began in 2002 and ended in 2003. He asserts that he was demoted partly out of retaliation for that EEO activity. At best, Lang has shown that Voelker knew about the previous EEO claims at the time in demoted Lang. However, there is no summary judgment evidence showing a causal connection between Lang's demotion and his previous EEO activity. The summary judgment evidence on the subject is that Voelker demoted Lang because he believed Lang had behaved inappropriately and was no longer suitable for the responsibilities required by his current position as a DDSM. Thus, Lang has also failed to establish a prima facie case if retaliation.

C. BEP Has Articulated a Legitimate, Non-Discriminatory Reason and Lang Has Failed to Show Pretext

If Lang had been able to establish a prima facie case of discrimination or retaliation, summary judgment for BEP would nonetheless be proper under the McDonnell Douglas burden-shifting framework. BEP met its burden of producing a legitimate, nondiscriminatory reason for demoting Lang in stating that such demotion was due to Lang's inappropriate behavior. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993) (stating that the employer's burden is only one of production); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (establishing that the employer "need not persuade the court that it was actually motivated by the proffered" reason).

Consequently, the inference created by a prima facie case discrimination or retaliation "drops out" and the burden shifts to Lang to prove BEP's supposed legitimate reason was actually a pretext for discrimination. Price v. Federal Express Corp., 283 F. 3d 715, 720 (5th Cir. 2002) (citing Hicks, at 507-09). On summary judgment, once the burden has shifted back to the plaintiff, he "must substantiate his claim of pretext through evidence demonstrating that discrimination lay at the heart of the employer's decision." Price, at 720 (citing Rubenstein v. Adm'rs. of the Tulane Educ. Fund, 218 F. 3d 392, 400 (5th Cir. 2000). Lang failed to produce such evidence. The record is clear that Voelker concluded that Lang conducted himself in an inappropriate manner and that, because of such behavior, he was no longer suitable for supervisory role as was required of the DDSM position. The proffered evidence of pretext does not rebut BEP's articulated reason for demoting Lang. Thus, even if Lang had established prima facie cases of discrimination or retaliation, his claims could not survive summary judgment.

VI.
Order

For the reasons discussed above, the court concludes that BEP's motion for summary judgment should be granted. Therefore,

The court ORDERS that all claims and causes of action asserted by Lang against BEP in the above-captioned action, be, and are hereby, dismissed with prejudice.

The court further ORDERS that BEP's motion to strike, be, and is hereby, denied as moot.

The court further ORDERS that BEP's motions in limine, be, and are hereby, denied as moot.

SIGNED February 1, 2007.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX D

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

[January 20, 2006]

David L. Lang
Petitioner,

v.

John W. Snow,
Secretary,
Department of the Treasury,
Agency.

Petition No. 03A60020

MSPB No. DA-0752-04-0553-I-1

DECISION

On October 25, 2005, petitioner filed a timely petition with the Equal Employment Opportunity Commission asking for review of a Final Order issued by the Merit Systems Protection Board (MSPB) concerning his claim of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.*

Petitioner, a Deputy Security Manager at the agency's Bureau of Engraving and Printing, located in Fort Worth, Texas, alleged that he was discriminated against on the bases of race

(African-American) and Reprisal, when on October 23, 2004, he was issued a notice by his supervisor proposing his demotion to non-supervisory Security Specialist position, GS-12, for telling inappropriate anecdote. Specifically, petitioner was subjected to discipline for telling a purportedly "crude and offensive" anecdote at a Bureau meeting, where various agency stakeholders were present. The record reflects that petitioner had been repeatedly counseled for this kind of inappropriate behavior. Petitioner admitted to sharing the inappropriate anecdote at issue, and there were witness statements regarding the account. Thereafter, petitioner received a notice of demotion, and petitioner filed appeal with the MSPB.

Following a hearing, the Administrative Judge (AJ) found that the testimony of the witnesses involved, including agency officials, was more credible than that of petitioner. Specifically, the AJ found that by petitioner's own admission, his remarks to agency guests could reasonably be considered "as having a sexual meaning" and offensive. With respect to petitioner's race and reprisal claims, the AJ found that petitioner did not establish a *prima facie case*, but assuming arguendo that he had, petitioner failed to show that agency officials were motivated by discriminatory/retaliatory animus. In effect, petitioner failed to show a nexus between his EEO activity and the agency's actions or that the actions were a pretext for unlawful discrimination.

Petitioner sought review by the full Board, but the Board denied petitioner's petition for review. Thereafter petitioner filed the instant petition with the Commission, where he made arguments mainly asserting that the AJ abused his authority in improperly excluding supporting witnesses and denying discovery requests made by petitioner.

EEOC Regulations provide that the Commission has jurisdiction over mixed case appeals on which the MSPB has

issued a decision that makes determinations on allegations of discrimination. 29 C.F.R. § 1614.303 *et seq*. The Commission must determine whether the decision of the MSPB with respect to the allegation of discrimination constitutes a correct interpretation of any applicable law, rule, regulation or policy directive, and is supported by the evidence in the record as a whole. 29 C.F.R. § 1614.305(c).

Based upon a thorough review of the record and for the foregoing reasons, it is the decision of the Commission to concur with the final decision of the MSPB finding no discrimination. Further, the Commission finds that the AJ's rulings were proper, as the record does not support complainant's contention that either his proffered witnesses or discovery requests would have provided a different outcome in this matter. The Commission finds that the MSPB's decision constitutes a correct interpretation of the laws, rules, regulations, and policies governing this matter and is supported by the evidence in the record as a whole.

PETITIONER'S RIGHT TO FILE CIVIL ACTION (WO900)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court, based on the decision of the Merit Systems Protection Board, within thirty (30) calendar days of the date that you received this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DAVID L. LANG
Appellant,

DOCKET NUMBER
DA-0752-04-0553-I-1

v.

DEPARTMENT OF THE TREASURY,
Agency,

DATE: Sep. 23, 2005

David L. Lang, North Richland Hills, Texas, pro se.

Michael A. Battle, Fort Worth, Texas, for the agency

BEFORE

NEIL A.G. McPhie, Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has fined a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is

found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative Judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

[January 26, 2005]

DAVID L. LANG Appellant,
DOCKET NUMBER DA-0752-04-0553-I-1

v.

DEPARTMENT OF THE TREASURY,
Agency, DATE: Jan. 26, 2005

Christopher A. Troutt, Esquire, Rod Tanner & Associate, P.C., Fort Worth, Texas, for appellant.

Michael A. Battle, Esquire, and Mary A. Larson, Esquire, Fort Worth, Texas, for the agency.

BEFORE

William W. Carnes
Administrative Judge

INITIAL DECISION

David L. Lang appealed to the Board on June 30, 2004, from an agency action that demoted him from GS-14 to a GS-13, effective February 8, 2004. The appellant first filed a formal discrimination (EEO) complaint on the adverse action, but after 120 days lapsed without a decision on that complaint, he filed this appeal. The Board has appellate jurisdiction over

this timely-filed appeal. See 5 U.S.C. §§ 7511-7513, 7702: 5 C.F.R. § 1201.154(b) (2004.). At the appellant's request a hearing was conducted on this appeal.

The agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

The appellant is employed by the agency's Bureau of Engraving and Printing in its Western Currency Facility (WCF), located in Fort Worth, Texas. He held the GS-14 position of Deputy Security Officer (also known as Deputy Security Manager) for the WCF. On October 21, 2003, a notice was issued by the facility's Security Manager, Martha Howe, proposing the appellant's demotion to a non-supervisory Security Specialist, GS-12, for "telling an Inappropriate Anecdote." [4] See appeal file, tab 6(4g). After the appellant made a reply to that proposal, *id.* Tab 6(4f), Ron Voelker, Manager of the Currency Manufacturing Division, issued a decision notice dated January 23, 2004, advising the appellant that the reason stated in the proposal was fully supported by the evidence and it was his decision the appellant would be demoted to a non-supervisory position. Voelker explained, however, that after evaluating the situation, he had determined that the efficiency of the service would best be served, and at the same time likely bring about a positive change in the appellant's behavior, by

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[4] The specification under this single charge involves an incident at a meeting of the Tarrant County Emergency Planning Committee (TCEPC) at the WCF on August 20, 2003, at which the appellant allegedly told a "crude and offensive" anecdote. See appeal file, tab 6(4g).

placing him in the position of Investigator, GS-13. [5] *Id.*, tab 6(4e).

On appeal to the Board, the appellant contended that this demotion was improper because the punishment was too harsh, it constituted disparate treatment, the action was motivated by racial discrimination, and was in retaliation for a prior EEO complaint. He also alleged that the agency committed a harmful procedural error because the deciding official was not an administrative level higher than the proposing official. See appeal file, tabs 1, 11, 12.

In an appeal of an adverse action, the agency has the burden of proving the reason for its decision by a preponderance of evidence. 5 U.S.C. § 7701(c)(1); 5 C.F.R. § 1201.56 (2004). The agency also must show that its adverse action promotes the efficiency of the service and that the penalty imposed was appropriate for the particular circumstances of the case. The appellant bears the burden of proving his affirmative defense by preponderant evidence. *Id.*

Many material facts are not in dispute.

Based on stipulations by the parties, [6] as well as certain documents and evidence of record not challenged or refuted, many of the facts material to this action are established without dispute. See appeal file, tabs 1, 6, & 15. At the time of this adverse action, Howe and Voelker (both Caucasian) were GS-

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[5] The Notification of Personnel Action (form SF-50B) reflects that the change to lower grade, effective February 8, 2004, included the least possible reduction in pay. Appeal file, tab 6(4d). The appellant's annual salary was GS-14, step 3 - $88,442. *Id.*

[6] A stipulation of fact between the parties satisfies the burden of proving that fact. See 5 C.F.R. § 1201.63 (2004).

14's the same as the appellant. Both of them were aware that the appellant had previously engaged in EEO activity. Howe was the appellant's immediate supervisor. On August 20, 2003, the TCEPC, consisting of men and women representing various corporations, communities, organizations, and agencies, conducted a meeting in the WCF's auditorium. The parties stipulated that the appellant told an anecdote, the essence of which follows, to the men and women in attendance at that meeting:

> A drunk man stumbled into Military Police headquarters, where Lang was stationed. The drunk man told Lang "Someone stole my car." Lang asked him "Where did you last see it?" The drunk man removed from his pocket a ring of keys, held out his car key, pointed to it and said "Right here." Lang then told the man " I will help you find your car, but I will also have to give you a citation for indecent exposure because your clothes are disarranged, your pants are open and you are partially exposed." The drunk man looked down and stated "Oh no, they stole my girlfriend too."

See stipulations, appeal file, tab 15.

The parties agreed that the Bureau of Engraving and Printing employee handbook provides that sexually oriented or otherwise offensive remarks on Bureau premises will be cause for disciplinary action. The appellant acknowledged that, during both his military career and agency employment, he has received training regarding sensitivity issues and sexual harassment. The agency conceded that it was not aware of anyone at the August 20th meeting who

presented any informal or formal complaint to the agency about the story told by the appellant. *Id.*

A preponderance of the evidence supports the charge

The appellant conceded that he had no direct involvement in the planning of program presentation of the TCEPC meeting on August 20, 2003. Hearing tape (HT) 4. Although, he explained, his duties included various responsibilities regarding facility security, so he knew of the meeting, and he became aware that some of the dignitaries began arriving early. [7] He said that he checked with Isaiah Liggins, [8] the primary host for the meeting, who was greeting arrivals at one of the facility's entrance points. He offered to give Liggins a hand. Liggins said that would be great, so the appellant went into the auditorium to see what he could do to assist with the early arrivals. When he walked in, Gary Medesy, an employee who was assisting Liggins with the meeting, was the only agency representative present. Medesy introduced the appellant to the group and said that, if they had security questions, the appellant was the man to ask, and basically turned things over to the appellant. The appellant said that he had no agenda nor any prepared material to discuss, but he answered

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[7] It was undisputed that arrivals for the meeting were expected between noon and 12:30 that day, but some participants arrived prior to that time. Because of the high security at WCF, they were escorted to the auditorium where the meeting was to be, but there were no refreshments or activities ready and planned for that early.

[8] Liggins is a Deputy Staff Manager at the WCF. He was the agency's host for this meeting, as well as the primary planner and coordinator for the event. Liggins confirmed that the appellant had no roll in that meeting or its planning. HT 1A.

questions and made some jokes, until Liggins was ready for the meeting to begin. *Id.*

The appellant testified that he was just ad-libbing, trying to establish a rapport with the group, when he decided to tell the story about the drunk, from his experience in the Army. He said that he acted out the events, mimicking the drunk as best he could. At the hearing, he opined that it was the drunk that made the story funny, not any sexual innuendo. The appellant said that, as he was finishing his story, he noticed that his supervisor, Howe, had come into the auditorium, although he did not see her enter. He said that, after completing the story about the drunk, Howe looked into his eyes, shook her head, and walked out. He wanted to say something funny, so he told the audience, "Well, that was my boss, so be on the look out for my resume." The appellant said that he was about to "run out of stuff" as more guests arrived. To his relief Liggins finally came into the auditorium and took over the meeting, so he left and returned to his office. *Id.*

Later he was in the hall outside of the auditorium, while the meeting was still going on. A group of employees were talking. In that group was Medesy and Liggins. The appellant testified that Medesy told Liggins he should have been there when the appellant was talking to the group, "he was on a roll." Medesy tried to get the appellant to repeat for Liggins the story of the drunk, but the appellant said that he did not do it. No one mentioned that any of the guests had said they were offended by his comments, and there was no suggestion that he should apologize to the group for his comments. The appellant said that no one at the agency ever asked him for his side of the

story about what happened at that August 20th meeting. HT 4.

The appellant said that, about a month later, in September, there was another group of visitors at the WCF, and Howe told him, "Don't be a comedian for this group." The appellant explained that he did not intend his story as a dirty joke or think of it at the time as having any sexual connotation – he just thought it was a funny story about a drunk. Although, at the hearing, he admitted that, in retrospect, he could see how others, including Howe, could interpret a sexual innuendo to the story.

Liggins explained that Medesy was responsible for handling the incoming TCEPC guests prior to the start time, but it was true that some of the attendees arrived earlier than expected, before they wee completely set up for the meeting. HT 1. Liggins testified that he did not recall the appellant coming to him that day and offering to help out. He said he did not remember telling the appellant he could help keep the early arrivals occupied in the auditorium until time for the meeting. He admitted, however, that, while checking on the refreshments just before the meeting started, he was surprised when he saw the appellant at the podium talking to the guests. He said that, when the appellant first saw him, he attempted to turn the meeting over to him. Since he was still not ready to start the meeting, he indicated to the appellant to continue whatever he was doing – he assumed the appellant was discussing security issues with the group. Liggins estimated there were 15-20 guests then in the auditorium. He acknowledged that he later thanked the appellant for helping with the crowd. Liggins did not hear the appellant tell the story about the drunk. *Id.*

Later that day, in a small employee group in the hall, someone said Liggins should have been there for the appellant's story. Liggins indicated that the appellant commented that he might have gotten into trouble because of it. See also appeal file, tab 6(4i). Liggins asked the appellant to repeat it. At first, the appellant said, "You don't want to hear it," but then he told it again anyway. The small group laughed. Liggins agreed that it was easy to "connect the dots" for a sexual meaning, and he acknowledged at the hearing that a sexual story was inappropriate for that mixed group of guests. Liggins said that, after repeating the story, the appellant then commented that he had noticed his supervisor in the audience just before delivering the punch line. So, after she left, the appellant told the crowd something like "I'll have my resume available for you, because I might be in trouble with my boss." Liggins asked Medesy how the guests had responded to the story and he reported that there did not seem to be any negative reaction. Liggins said that he did not want to draw attention to the situation, so he did not ask any of the guests if they wee offended by what the appellant had said. According to Liggins, the meeting overall was highly successful, so he took no action nor reported the anecdote incident to anyone Although later, he was questioned about the incident in an investigation. HT 1.

Medesy, a program planning specialist, testified that he was assisting Liggins that day with the visitors and the meeting. HT 3B. When the guests began arriving early, he was responsible for escorting and staying with the first group of TCEPC arrivals, to ensure security. The refreshments were not ready and no entertainment was set up; so, he was at the

podium trying to occupy them until start time. He had finished some comments about the tight security at the WCF, when the appellant walked into the auditorium. He grasped at the opportunity and introduced the appellant and said that he was a security expert and could answer any questions they might have about security. The appellant came to the podium and began talking to the crowd. Medesy averred there were about nine visitors in the auditorium at that time. *Id.*

Medesy said he was standing to the side off the auditorium when the appellant told the anecdote about the drunk. Medesy testified that the appellant did not use any gestures while telling the story. He thought everyone laughed when the appellant finished. He noticed Howe come into the auditorium while the appellant was telling this story, but he did not think the appellant saw her at first. When the appellant noticed Howe, he said, "Well, my boss just heard that." Then as Howe left the auditorium, the appellant told the group something about sending out his resume for a job. He assumed the appellant was just being light-hearted, not literal. The appellant continued talking to the group. At one point Liggins came in, but said they were not ready yet, and told the appellant to continue. Once Liggins said they were ready to start the meeting, the appellant left. *Id.*

Medesy admitted that punch line of the appellant's anecdote had a sexual innuendo to it and was "no the line." So he gauged the crowd and, since they laughed, he did nothing – not wanting to bring attention to the situation. Still, he felt that he should advise someone about it. So he reported it to his supervisor, Liggins, later, while they were in a small group of employees. As he was telling Liggins about it, the appellant

walked up. He felt only the appellant could do justice to the story, so with some encouragement, the appellant repeated essentially the same story for Liggins. Medesy advised Liggins that the visitors seemed to enjoy the appellant's anecdote. Medesy explained at the hearing that he did not report the incident to anyone above Liggins, because he figured it was up to Liggins to take it further, if he wanted. Medesy did subsequently prepare a statement about it, however, when asked to do so by Howe. Medesy opined that the appellant was an excellent speaker, but he acknowledged that his story was in "bad taste," and that he would not himself have told such a story. HT 3B.

Martha Howe testified that she went into the auditorium to see how the TCEPC meeting was going and, to her surprise, the appellant, who had nothing to do with the meeting, was at the podium addressing the group. HT2. She estimated 15-20 guests were there at that time. Howe said that the appellant was in the midst of telling a story about a drunk man – she heard most of it, except for the introduction. She testified that, just before he delivered what she called the punch line, the appellant looked squarely at her, but went ahead with the joke anyway. Howe said she was surprised and shocked by such a sexual comment in front of the visitors, but admitted that the only "gasp" she heard was her own. She conceded there was some laughter from the crowd. She did not want to make a scene, so she decided no immediate action was necessary and walked out. As she was leaving, she heard the appellant make a comment, something like "that was my boss, so I may be passing out resumes – I may be looking for a job." She considered

this to mean that he knew at the time his comments were inappropriate and that she did not approve. *Id.*

Howe said that, because she had previously counseled the appellant about his jokes and inappropriate comments, it did not appear that he was going to change. This incident was the catalyst that convinced her that the appellant should not be in a supervisory/managerial position and caused her to lose trust in him as her deputy manager. Howe felt she had to do something more serious this time. She consulted with the Human Resources (HR) Director, David Graf, about how to proceed with a demotion action. At Graf's suggestion, statements were gathered and she reviewed what options were available. The only suitable non-supervisory vacancy in her division was a GS-12 security specialist position. So with Graf's assistance, she issued the proposed demotion to that position. The WCF Plant Manager, Charlene Williams, was away at the time on extended leave. Ron Voelker was the acting plant manager. When Graf drafted the letter for her, he listed Voelker as the official to receive the response. Howe testified that she never discussed the proposal or the demotion with Voelker. HT2.

Voelker testified that he considered the conduct displayed by the appellant's telling of this anecdote as inappropriate because it projected an unprofessional image of the facility to the VIP visitors that day. He said that the record he reviewed showed the appellant had been placed on notice regarding "dirty jokes" and inappropriate comments, but that he just did not seem to "get it" concerning the level of professionalism expected of his leadership position. Accordingly, he

determined that this misconduct warranted a demotion to a non-supervisory position. [9]

The facts are not in dispute that the appellant told the anecdote, as charged. As to whether telling such a story was inappropriate, it is obviously dependant on the circumstances of the particular incident and the audience being addressed. Again, the material facts surrounding this incident are not in dispute. I find it highly unlikely for anyone hearing (or reading) the essence of the appellant's anecdote not to recognize the sexual meaning at the end of the story. I find this to be the case, regardless of the speaker's intent in telling about these events.

The appellant agreed at the hearing that the agency was right – people could interpret his story as having a sexual meaning. But, he said that he didn't think of it that way at the time – he was just telling about a funny incident involving a drunk. It is clear that the appellant was fully aware of the nature of the meeting that was taking place and of the importance of those TCEPC guests that were in attendance. He admitted that he did not know any of the guests present when he was talking to them. Even though all attendees were not yet present when he told the story, there was by all accounts, somewhere from 9 to 15-20 visitors of both genders listening to him. His status as a high-level security official at the WCF was known to them, and it is quite clear that, at that moment, he was seen by those visitors as a representative of the agency.

Based on the undisputed facts regarding this incident, I conclude that the anecdote told by the appellant just prior to the beginning of the TCEPC meeting on August 20, 2003, was inappropriate under

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[9] The basis for the mitigation of the penalty and other aspects of Voelker's final decision are discussed in more detail, infra.

the circumstances. This is particularly so because of the level and nature of his position with the agency. Accordingly, the charge is sustained. As to whether the penalty imposed by the agency for this misconduct was reasonable, that issue is discussed further below.

The appellant has not proven discrimination on the basis of race.

The appellant alleged that this adverse action was discriminatory on the basis of his race (African-American). Such discrimination, if proven, would constitute a prohibited personnel practice under 5 U.S.C. § 2303(b)(1). The appellant bears the burden of proof on such an affirmative defense, by a preponderance of the evidence. [10] *See* 5 U.S.C. § 7701(c)(2)(B); 5 C.F.R. § 1201.56 (2004).

The appellant basically alleged that, because he is an African-American, and the officials taking this action are not, that he was discriminated against. He also argued, apparently because of his race, that he was treated unfairly and that the penalty imposed was too harsh for the offense. He adduced no evidence, however, showing any disparate treatment of any similarly situated employee of a different race.

HR Director Graf testified that he was unaware of any disciplinary actions taken for this kind of

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[10] For race discrimination claims, the Board follows generally the evidentiary test described by the Supreme Court in *McDonnell Douglas Corp. v . Green*, 411 U.S. 792 (1973). The appellant must establish a *prima facie* showing of discrimination; then the burden shifts to the agency to articulate a legitimate nondiscriminatory basis for the action; and then, if appropriate, the appellant must prove that the agency's articulated reason is merely a pretext for discrimination. *Id.*; *see also, St. Mary's Honor Center. Hicks*, 509 U.S. 502 (1993).

misconduct, and he was not familiar with any other employees having committed on offense similar to the appellant's. Howe was asked and acknowledged that she was aware of a former employee (Tischman?), sometime in the last 5 years, having been accused of inappropriate sexual misconduct. As the second-level supervisor, she took no action in that case. She explained that the first-line supervisor handled that disciplinary mater by an oral counseling of that employee. HT 2B. No evidence regarding the nature of that misconduct was presented, neither the race nor position of that individual was established, and no other evidence was adduced nor specific allegations made regarding disparate treatment of any other employee.

The mere fact that the appellant is African-American, by itself, in no way shows disparate treatment, nor does it support an inference of discrimination otherwise. The appellant presented no probative evidence showing a similarly situated employee of another race that was treated differently. There was no evidence of any employee involved in misconduct similar to the appellant's offense. Thus, I find no evidence to establish a *prima facie* case of race discrimination.

Moreover, even if a *prima facie* case of disparate treatment based on race had been shown, this discrimination claim still fails. The sustained charge provides a legitimate non-discriminatory basis for imposing discipline. Thus, I find that the second element of the McDonnell-*Douglas* discrimination test, *i.e.*, articulation of a legitimate non-discriminatory reason for the action has been met. *See, e.g., Carter v. Small Business Administration*, 61 M.S.P.R. 656, 666 (1964). In order to prevail, then the appellant has to

prove by preponderant evidence that this action and the reasons for it were a mere pretext to discriminate against him because of his race. *See e.g., St. Mary's Honor Center*, 509 U.S. at 506-08; *Carter*, 61 M.S.P.R. at 665-66. He has not done this.

There is no evidence showing any discriminatory motive or racial considerations by the officials taking this adverse action. I find no basis to infer that this action was taken as pretext to discriminate against the appellant due to his race. An appellant's allegation of discrimination, unsupported by probative evidence, does not prove an affirmative defense. *See e.g., Romero v. Equal Employment Opportunity Commission*, 55 M.S.P.R. 527, 539 (1992), *aff'd.* 22 F.3d 1104 (Fed. Cir. 1994)(Table). The appellant failed to meet his burden of proof -- he has not shown that the agency discriminated against him on the basis of race.

The appellant has not proven this adverse action was taken as reprisal.

The appellant also alleged as an affirmative defense that the agency removed him in reprisal for having previously filed EEO complaints. He claimed that the prohibited personnel practice of retaliation was one of the real reasons for the agency taking this adverse action. [11] This is another affirmative defense on which the appellant bears the burden of proof.

In order to establish a prima facie case of prohibited reprisal for the protected activity of pursuing an EEO complaint, the appellant must prove by preponderant evidence (1) that he engaged in the protected activity,

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[11] Reprisal for a protected activity, such as utilizing the EEO process, is a prohibited personnel practice under 5 U.S.C. X 2302(b)(9).

(2) that the officials responsible for the adverse action knew about that activity, (3) that the appealed action, under the circumstances, could have been retaliation, and (4) that there was a genuine nexus between retaliation and the action taken. *See, e.g., Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986); *Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 222 (1988).

It is clear and undisputed that the appellant has previously engaged in EEO activities by filing several discrimination complaints. [12] The parties stipulated to that fact. See appeal file, tab 15. They also stipulated that both the proposing official, Howe, and the deciding official, Voelker, were aware that the appellant had engaged in that EEO activity. *Id.*

In addition to his general claim that the agency, and in particular Howe, was retaliating against him for his prior EEO complaints, he contended that, because the agency had included a copy of a portion of his February 2003 complaint as an attachment to the proposed demotion notice, it conclusively showed that this adverse action was a prohibited personnel practice based on reprisal for protected EEO activity. He adduced no specific evidence, however, to establish

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[12] The record reflects that the appellant filed an EEO complaint in or about February 2000, when he applied for, but was not selected to, the position of Security Manager. That complaint was settled with the agency in February 2001. *See e.g.*, appeal file, tab 1, attachments. The appellant also filed complaints (informal and/or formal) in June 2002 and February 2003, alleging race and sex discrimination and reprisal by Howe in connection with his work environment and assignments. *Id.* The appellant's most recent EEO complaint was filed in February 2004. That complaint, however, was subsequent to and actually about the adverse action here on appeal. *Id.*, tab 6(3).

that either official had any particular reprisal motivation because of his prior complaints.

Because the appealed action occurred after several of the appellant's prior EEO complaints, it is theoretically possible that this demotion could have been in reprisal for that protected activity. Nevertheless, before finding that it was prohibited reprisal, the fourth and crucial step of the *Warren* test must also be proven. There must be preponderant evidence showing a true nexus or causal connection between this adverse action demotion and the appellant's prior protected activity. *See, e.g., Peterson v. Department of Transportation*, 54 M.S.P.R. 178 (1992).

Howe testified that the appellant's prior EEO activity had nothing to do with this case. HT 2. She explained that her prior counseling and warnings to the appellant regarding his words and actions were taken into consideration. Because she had not been able to get him to change, and he had even told her he did not intend to change, she was convinced that his telling this anecdote on August 20th in her presence was proof that he was not going to change. Thus, she lost trust and confidence in him as her deputy manager and a supervisor. Howe consulted with the legal department and with Graf in HR about how to go about getting the appellant into a non-supervisory position. Graf advised her he could do some research as to the appropriate disciplinary means in this situation, and that witness statements would be needed to support any adverse action based on alleged wrongdoing. The highest-graded, non-supervisory position under her control was a GS-12. After considering the matter further, and continuing discussions with Graf, she subsequently asked Graf to

draft a proposed demotion to that GS-12 position, based on the appellant's misconduct of August 20, 2003. She reviewed that proposal notice and signed it. Once it was issued, the matter was out of her hands. She said that, although she had nothing to do with the next phase of the adverse action, she presumed the deciding official would be Voelker who was acting plant manager at that time. *Id.*

Howe also testified about the prior incidents that convinced her to go forward with this proposed demotion. [13] She explained that a supervisor once informed her that jokes told by the appellant at lunch were often full of sexual innuendo and made that supervisor uncomfortable. Another time, a different employee reported the same thing to her about the appellant. Howe said that she had not yet talked to the appellant about those complaints, when another incident happened. It was at an official (secretaries' day) luncheon at a local restaurant, she felt the appellant was talking and acting inappropriately toward an attractive female waitress. At the restaurant, she only commented to the appellant to "please hold it down." She felt the appellant was setting a "bad example," so when they returned to the office, she counseled him about it. He said he couldn't understand why she had a problem with his behavior. Howe testified that when she prepared the appellant's appraisal for that year, based on her counseling, she

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[13] In addition to the oral counseling incidents described by Howe, she also said that she had given the appellant a written letter warning, although she acknowledged that it did not pertain to any sexual language. That the letter of warning was issued by Howe in February 2003 for two incidents of "disrespectful conduct towards a supervisor" in December 2002. The incidents involved emails from the appellant to Howe. *See* appeal file, tab 6(4q).

lowered the evaluation on his EEO performance element from an exceeds to achieved. Also because of that, she addressed all managers within the security division about raising the level of the way they conducted themselves in order to ensure a good environment for all employees at the WCF. *Id.*

Howe said there was another time, after that, that she overheard the appellant making a joke about a "ho" when talking with a female employee in the hall. Howe said that they were not discussing gardening, and, although she did not recall the other words spoken, she believed at the time by the context used, that the appellant meant a sexual connotation of "whore" by using the term "ho." Later that day, she orally counseled the appellant about this, telling him that this was just the kind of conduct he needed to correct. The appellant became angry, and said that was who he was and that he had no intention of changing. She said that is why, when he told the anecdote in question, even though he knew she was present, she believed it was his way of showing her that he did not intend to heed her counseling and that he was not going to change his behavior. Thus, she decided she needed to initiate an adverse action. *Id.*

Voelker testified that his primary position at WCF at the time was Manager of the Currency Division. [14] HT 3. He was the same grade level as Howe, and both of them reported directly to the plant manager. He explained that, of all division managers, only his position description included the additional duty and title of deputy plant manager. Because he was the

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[14] Voelker explained that as the head of the currency division, the largest division at the facility, he supervised more than 60% of all employees at the WCF.

acting plant manager when the proposed demotion of the appellant was issued, he was the person designated to receive the appellant's response. He continued in the role of deciding official, including consultation with Graf in an effort to mitigate the demotion's financial impact on the appellant, but that would still take him out of a manager/supervisory capacity. He said that he determined such a demotion was warranted, based on the appellant's conduct, which was not in dispute, and other evidence with the proposal package that demonstrated prior efforts to correct his behavior. Voelker testified that he never discussed with or consulted in anyway with Howe about the incident, her proposal, or the choice of penalty. *Id.*

Voelker admitted that he knew the appellant's race and the fact that he had filed prior EEO complaints. But, he attested, those facts had nothing to do with his decision process and that he did not discriminate against the appellant or take any retaliation against him. When asked about the copy of the appellant's EEO complaint that was part of the proposal package, Voelker said that Graf pointed out to him that it was there because it included a reference to Howe having counseled the appellant about telling "dirty jokes." [15] Voelker attested that this was the only information he

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[15] The comments Voelker referred to are in an EEO counselor's report of an informal EEO complaint filed by the appellant in February 2003, a copy of which was attached to the proposal notice. See appeal file, tab 1(B), attachment 9. On page 5 of that informal complaint, in describing some of the incidents raised as issues by the appellant, is the statement that Howe had counseled the appellant during his performance evaluation and advised him that she disapproved of him telling "dirty jokes." *Id.*

extracted from the EEO complaint in relation to this adverse action. That document was one of several evidentiary examples with the proposal that he felt demonstrated that the appellant had been put on notice that the kind of story he told in front of the visitors on August 20, 2003, was not acceptable.

Graf testified that, as part of his duties as the acting Chief of HR, he advised and assisted both Howe and Voelker in the processing of this adverse action. HT 1B-2A. He drafted both the proposal and the decision letters, as requested by Howe and Voelker, respectively. He said that Howe believed the misconduct warranted a demotion, so he put together the evidence t support the adverse action, and when she identified the demotion position, he drafted the letter and attached what he considered appropriate supporting information. Since Voelker was acting plant manager at the time, he was listed as the person to accept the appellant's reply, if any. Graff said that his research revealed no other incidents of similar misconduct. He explained that an important factor in Howe's decision to recommend the demotion was that the appellant was on notice of instances of such inappropriate conduct and her apparent unsuccessful efforts to correct his behavior. Accordingly, Graf said that he attached to the proposal package evidence to demonstrate this, including a copy of the letter of warning and the EEO counselor's report indicating that the appellant admitted Howe had counseled him about telling "dirty jokes." Graf accepted full responsibility for attaching these documents, and he said that Howe never mentioned the appellant's prior EEO complaints to him nor did she ask him to include this EEO complaint as an attachment. *Id.*

I found the testimony of Voelker, Howe, and Graf, regarding the nature of the attachments with the proposal, and the purpose for which they considered these documents to be plausible and credible. *See, e.g., Hillen v. Department of the Army,* 35 M.S.R.P. 453, 458 (1987) (various considerations for resolving credibility issues). Clearly, the deciding official is the most important player in the decision process, and I find nothing to suggest or infer that he harbored any improper retaliatory motive against the appellant because of his prior protected EEO activity. Moreover, there is no credible evidence showing any improper consideration or motivation regarding the appellant's prior EEO activities by the three officials involved in the adverse action. The appellant's allegations alone are insufficient to overcome the evidence that this disciplinary action was taken for a legitimate reason. I am unable to conclude that there is any nexus or causal connection between this demotion and appellant's prior protected activity. Allegations of reprisal, unsupported by probative and credible evidence, do not prove reprisal. *See, e.g., Romero,* 55 M.S.P.R. at 539. Accordingly, I find that the appellant has not established that this action was taken in reprisal for having filed prior EEO complaints. *See, e.g., Trammell v. Department of Veterans Affairs,* 60 M.S.P.R. 79, 88-89 (1993). This affirmative defense also fails.

No harmful error has been shown.

The appellant alleged also that the agency committed harmful procedural errors in taking this action. He claimed that agency's own directive/regulation requires that the deciding official must be at a higher administrative level than the proposing official. He contended that Voelker did not

meet that requirement. In order to prevail on an affirmative defense of harmful error, the appellant must first prove by preponderant evidence that, in taking the action on appeal, the agency committed error in the application of its procedures; and then, if there was error, that the error was harmful. [16] *See,* e.g., *Coughlan v. Department of the Air Force,* 35 M.S.P.R. 230 (1987); *Parker v. Defense Logistic Agency,* 1 M.S.P.R. 505, 513 (1980); 5 C.F.R. § 1201.56(c)(3) (2004)

The parties stipulated that the applicable Bureau of Engraving and Printing Manual, Chapter 752 on Adverse and Disciplinary Actions, section 4-9, states:

> a. The deciding official in an adverse action must be at least one administrative level higher than the proposing official (normally it is the Office Chief). The deciding official may have been aware of the existence of a case or action against the employee, but must not have effectively been the proposing official of an adverse action.

See stipulations, appeal file; tab 15. The agency argued throughout the appeal that Voelker was an administrative level above Howe, notwithstanding that they were the same grade level.

As discussed above, Voelker testified that among the division chiefs, his role was significantly different.

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[16] "Harmful error" means the error was "likely to have caused the agency to reach a conclusion different from the one it would have reached in absence of cure of the error" 5 C.F.R. § 1201.56(c)(3) (2004). The Board will not reverse an action based on a procedural error unless, considering the record as a whole, that error likely had a harmful effect upon the outcome of the case before the agency. *E.g., Baracco v. Department of Transportation,* 15 M.S.P.R. 112, 123 (1983), *aff'd sub nom. Adams v. Department of Transportation,* 735 F.2d 488 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984)

HT3 The unrefuted and credible testimony of Voelker, and confirmed by Graf's credible testimony, showed the elevate nature of Voelker, among the division chiefs. Id., see also HT 1B-2A. Within his division, Voelker supervised the majority of WCF employees. He was indirectly responsible for the production of 55% of the nation's currency. The position description for him, as that division chief, specified that he was the deputy plant manager. Hearing exhibit 2, appeal file, tab 16. No other division chief had this title of designation. It was conceded that other division chiefs, including Howe, sometimes acted as plant manager in the absence of the Plant Manager Williams, although that task was usually delegated to Voelker when he was available.

It is not disputed that, in October 2003, when the proposed adverse action notice was issued, Williams was away from the WCF for an extended period and Voelker was the acting plant manager. Thus, it is clear that Voelker was the only person at the WCF at a higher administrative level when Graf drafted the proposal for Howe. Graf explained that was why he listed Voelker as the official to receive the appellant's reply, and it was presumed at the time that Voelker was the deciding official. The parties stipulated that, by the time the decision was issued by Voelker on January 23, 2004, Williams had returned to her position as plant manager. Appeal file, tab 15.

Voelker testified that, as acting plant manager and the response official, he granted an extension of time to reply, as requested by the appellant. HT 3. As the presumed deciding official, he received the appellant's reply, studied the adverse action file, and consulted with Graf regarding the matter. Voelker explained that he concluded the offense warranted taking

appellant out of a manager's position, but he felt that a lesser demotion than proposed was the most appropriate discipline for the situation. [17] He took extra time, working with Graf to have him consult with Howe about creating a higher-level, non-supervisory position that could take advantage of appellant's knowledge and abilities, and minimize the financial impact of the action on the appellant. This took additional time to accomplish. Accordingly, by the time the decision process was completed, the GS-13 position created, and the notice drawn up by Graf, Williams had returned to her position. Voelker and Graf agreed that because he had handled the process to that point, he had made the decision, and he was still at a higher administrative level than Howe, due to his deputy plant manager designation, he should finish out the action and be the one to sign the final decision.

The appellant's argument that a procedural error occurred was fairly basic. He contended that, because Howe and Voelker were both division chiefs at a GS grade 14, and the WCF organization chart reflected all division chiefs were one level below the plant manager, Voelker's role as deciding official was a procedural error in violation of the agency's manual.

The appellant's argument is not persuasive. It is quite apparent that Voelker was the deputy plant manager and Howe was not. Moreover, he was actually in the capacity of the acting plant manager in the absence of Williams during most of the period this adverse action was being processed and decided. I find that the preponderance of evidence supports a

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[17] The specific factors and consideration that went into Voelker's decision process and the reasons he gave for mitigating the penalty are discussed in more detail, *infra*.

conclusion that Voelker was an administrative level higher than the proposing official and there was no procedural error committed by the agency in this regard. Moreover, even if there was some kind of error by Voelker being the deciding official, there is no evidence showing how this prejudiced the appellant or how the outcome would have been different if Williams or someone else had been the deciding official. Harmful error by the agency has not been proven by the appellant.

The penalty in this case was not unreasonable.

An agency must show that the imposed penalty was reasonable and appropriate under relevant circumstances of a particular case. *See, e.g., Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 301 (1981). The agency's choice of penalty will be reversed only where the punishment exceeds the bounds of reasonableness and is so harsh to constitute an abuse of discretion. *E.g., Beard v. General Services Administration,* 801 F2.d 1318 (Fed. Cir. 1986). When the only charge relied on by the agency is sustained, as here, the Board will defer to the agency's judgment in choosing a penalty to meet its obligation to control and direct its work force, unless the imposed penalty is total unwarranted under the relevant circumstances. The Board must give due weight to the agency's primary discretion in maintaining discipline and efficiency of its employees. *See, e.g., Edwards v. Department of the Army,* 87 M.S.P.R. 27, 30-31 (2000), *aff'd, sub nom. Rodriguez v. Department of the Army,* 25 Fed. Appx. 848 (Fed. Cir. 2001). The Board's review in this case then is not to substitute for its judgment for that of the agency, but to confirm that the agency considered the proper factors and circumstances, and to ensure the action selected was

not arbitrary and grossly disproportionate to the offense. *See, e.g., Quinton v. Department of Transportation*, 808 F.2d 826, 829 (Fed. Cir. 1986); *Howard v. U.S. Postal Service*, 72 M.S.P.R. 422, 425 (1996).

The appellant contended tat this demotion was an extreme penalty and not warranted in this case. He argued that a reprimand would have been more appropriate for this offense.

Some of the rationale and explanation for the proposing and deciding officials' actions in this case have already been discussed, *supra*. Obviously, however, it is the deciding official's considerations and action that are the most significant in the Board's review of the appropriateness of the final penalty imposed.

Voelker testified that he reviewed the proposal package, which included witness statements of the incident, as well as other documents demonstrating that the appellant was on notice of the need to conduct himself in a professional manner and to avoid inappropriate language and behavior around others. HT 3. He heard the appellant's oral response and considered his written reply. He did not conduct his own investigation, rather he relied on the information presented to him. Voelker acknowledged that he had several discussions with Graf about the pending adverse action and they went over and evaluated the information several times. He asserted that, for this misconduct, there was no offense on point in the agency's table of penalties. He accepted Graf's counsel that there were no past agency actions involving other incidents of inappropriate anecdotes, but that a demotion penalty would not be out of line with other types of offenses of similar seriousness, *Id.*

Voelker explained that it was important that the WCF present a professional image to the public. He said this conference on August 20, 2003, was considered an important private sector "VIP tour" at the facility, and the appellant's actions, particularly given the level of his position, were a poor reflection on the agency for those individuals in attendance. [18] He averred that the documentation with the proposal showed clearly that the appellant had been put on notice regarding his inappropriate behavior and unprofessional conduct, yet, he had not responded pursuant to Howe's prior attempts to correct his behavior. Other aggravating factors Voelker mentioned were the appellant's replies suggested that he did not recognizes he had done anything wrong and it did not appear that he had any remorse for his actions. Favorable considerations identified by Voelker included that the appellant had no record of prior disciplinary actions, he was "technically sound" regarding security issues at the plant, his past performance evaluations for the agency were good, and he had a good military record. [19] *Id.*

Voelker said that he decided the appellant needed to be sent a message. At the same time, he believed the appellant needed to be taken out of any position where he had contact with the public. Even so, Voelker opined that the appellant's ability to be useful

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[18] It has long been the rule that supervisors and mangers, like law enforcement officials, can be held to a higher standard of conduct than other employees. *See, e.g., Fischer v. Department of the Treasury*, 69 M.S.P.R. 614, 619 (1996).

[19] The appellant testified that he retired from the Army in 1992 as a Master Sergeant after more than 21 years in the Military Police, and since, has successfully held several civilian jobs in the security field. HT 4A.

in the security of the facility was clear, so he requested that Graf try to come up with a position that would allow the appellant to be a contributing employee, but would have the least financial impact on him. After Graf discussed and negotiated with Howe, he reported to Voelker that a new GS-13 level investigator position was being created into which the appellant could be placed. This would also allow Voelker to set the appellant's pay at a level with the least possible reduction in salary. Voelker felt this was the best and most appropriate solution; therefore, he decided to mitigate the penalty by imposing a demotion to this new GS-13 position, rather than to GS-12.

Even though the appellant argued that consideration of his prior counseling and warning were inappropriate or did not happen the way the agency presented them, I find that a preponderance of evidence supports that the appellant had been placed on notice regarding inappropriate behavior and were proper factors for the deciding official to consider. As noted by the deciding official, his intention by imposing this penalty was to remove the appellant from a supervisory position with public contact; yet, still send a strong message regarding his conduct, while taking advantage of his technical expertise.

I find that the deciding official in this case properly considered the applicable *Douglas* factors and he adequately assessed the overall circumstances, including those that favored mitigation. He found that, under these circumstances, placing the appellant into a non-supervisory position with the least reduction in his pay was warranted and would best promote the efficiency of the service. I find that, because the charge is sustained; the agency properly

considered and weighed the appropriate relevant factors in reaching its decision; the one-grade demotion to a non-supervisory position was reasonable. Thus, I defer to the agency's choice of penalty. I conclude that the penalty imposed in this case was not unduly harsh, was within the bounds of reasonableness, and was not an abuse of agency discretion. *See Douglas.*

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: _____

William W. Carnes
Administrative Judge

APPENDIX G

CIVIL RIGHTS ACT OF 1964 (42 U.S.C. §§ 2000e-3, 2000e-5, 2000e-16)

2000e-3 § 704 (a) It shall be a unlawful employment practice for an employer to discriminate against any employee of applicant for employment...., because he has apposed any practice made unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in the investigation, proceeding, or hearing under this chapter.
2000e-5 § 706 (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice....
2000e-16 § 717(a) All personnel actions affecting employees or applicants for employment....shall be made free from any discrimination based on race, color, religion, sex, or national origin.
(b)(3) The head of each department, agency, or unit shall comply with such rules, regulation, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder.

EXECUTIVE ORDER No. 11478, EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

Section 1: It is the policy of the Government of the United States to provide equal opportunity in the Federal employment of all persons, to prohibit discrimination in employment because of race, color,

religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Section 3: The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment....

Section 4: The Equal Employment Opportunity Commission, after consultation with all affected department and agencies, shall issue rules, regulations, orders, and instruction and request such information from affected department and agencies as it deems necessary and appropriate to carry out this Order.

Section 5: The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order.

29 C.F.R. § 1614.106, INDIVIDUAL COMPLAINTS

(e)(2) The agency is required to conduct an impartial and appropriate investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the time period.

29 C.F.R. § 1614.107, DISMISSAL OF COMPLAINTS

(a) Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint:

29 C.F.R. § 1614.108, INVESTIGATION OF COMPLAINTS

(a) Investigation of complaints shall be conducted by the agency against which the complaint has been filed.
(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop an impartial and appropriate factual record upon which to make findings on the claims raised in the written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw a conclusion as the whether discrimination has occurred.
(e) The agency shall complete its investigation within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to *Sec. 1614.107.*

29 C.F.R. § 1614.302, MIXED CASE COMPLAINT
(d) Procedures for agency processing of mixed case complaints. When a complainant elects to proceed initially under this part rather than with the MSPB, the procedures set forth in subpart A shall govern the processing of the mixed case complaint with the following exceptions:
(1) At the time the agency advises a complainant of acceptance of a mixed case complaint, it shall also advise the complainant that: (i) if a decision is not issued within 120 days of the date of the filling of the mixed case complaint, the complainant may appeal

the matter to the MSPB at any time thereafter as specified at *5 C.F.R 1201.154(b)(2)* or may file a civil action as specified at *Sec. 1614.310 (g)*, but not both; and (ii) if the complainant is dissatisfied with the agency's final decision on a mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision.

(2) Upon completion of the investigation, the notice provided the complainant in accordance with *Sec. 1614.108 (f)* will advise the complainant that the final decision will be issued within 45 days without a hearing.

EEOC MANAGEMENT DIRECTIVE 110 (Md-110)

Chapter 1, paragraph III. Agencies must avoid conflicts of positions or conflict of interest as well as the appearance of such conflicts. For example, the same agency official(s) responsible for exciting and advising on personnel actions may not also be responsible for managing, advising, or overseeing the EEO pre-complaint or complaint process. Those processes often challenge the motivations and impact of personnel actions and decisions. In order to maintain the integrity of the EEO investigative and decision making processes, those functions must be kept separate from personnel functions.

5 C.F.R §1201.1153, CONTENTS OF APPEAL

(a)(1) The appeal must state that there was discrimination in connection with the matter appealed, and it must state specifically how the agency discriminated against the appellant: and

(a)(2) The appeal must state whether the appellant has filed a formal discrimination complaint or a grievance with any agency. If he or she has done so, the appeal must state the date on which the appellant filed the complaint or grievance, and it must describe any action that the agency took in response to the complaint or grievance.

5 U.S.C. § 7702, ACTION INVOLVING DISCRIMINATION

(a) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who-(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and (B) alleges that the basis for the action was discrimination prohibited by-*(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16)*

(b)(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either (A) concur in the decision of the Board; or (B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law – *(i)* the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in section *(a)(1)(B)* of this section.

(b)(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking of additional evidence to the extent it considers necessary to supplement the record.

RULE 56 FRCP, SUMMARY JUDGMENT

(e)(2) When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleadings; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

5 C.F.R. § 752.404(c)(2)

Agencies shall designate an official to hear the employee's response who has the authority either to make or recommend a final decision on the proposed adverse action.

BUREAU OF ENGRAVING AND PRINTING CIRCULAR 10-01, ORGANIZATIONAL MANUAL

Paragraph 1, Purpose: The Bureau of Engraving and Printing Organizational Manual delineates the responsibilities and functional relationships of all Bureau and organizational components.
Paragraph 2, Scope: This manual applies to all Bureau managers and organizational components.
Paragraph 10, Delegation of Authority:

(a) Specific Delegation: Grants the incumbent of a position or a specific person the right to act for the Director in specific instances....
(b) Functional Delegation: Grants the manager of a specific Bureau component the right to act for the director in carrying out functional responsibilities assigned in the Bureau Organizational Manual.
(c) General Delegation: Grants the incumbents of particular positions on the same supervisory level the right to act for the Director (e.g., all Office Chiefs approve overtime). Unless otherwise specified, general delegations of authority pass from the Director through the Deputy Director and Associate Directors to positions within an Office, Division, Section, or Unit component.
(c)(3) Authorities of the Associate Directors:
Exercise complete authority in their functional area to accomplish Bureau objectives.... Retained authorities are as follows: *(h)* Approval of personnel or position actions for Division Managers/Superintendents, and Staff Managers reporting to an Office Chief, GS-14 grades.

BEP CIRCULAR 10-02.3A, DELEGATION OF AUTHORITY

Paragraph 5, a.: "A specific delegation of authority grants the incumbent of a position or an individual the right to act for the Director in special instances. For the most part, specific delegations are made to the incumbent of a position rather than a person, except in those instances when it is required by law, regulation or appropriate administrative determination that the authority shall be exercised by a specific Bureau official. These delegations are

established by completing BEP Form 9280, Delegation of Authority"